(8)

No. 89- 89-6985

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO,

Petitioners,

-v.-

UNITED STATES OF AMERICA,

Respondent.

ORIGINAL

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner Horacio Alvarado respectfully requests leave to proceed here in forma pauperis, without payment of fees and costs.

Counsel certifies that in the court below, counsel was assigned to represent petitioner, pursuant to the Criminal Justice Act.

Dated: New York, New York
March 16, 1990

ABRAHAM L. CLOTT
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
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Attorney for Petitioner ALVARADO.

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ORIGINAL

No. 89-

IN THE

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

HORACIO ALVARADO,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Whether intentional discrimination by the government in selecting a petit jury in violation of the fifth amendment is rendered harmless merely because the final composition of the jury somewhat reflects the district of trial?

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TABLE OF CASES

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner Horacio Alvarado respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit rejecting his claim that he was entitled to a new trial because of intentional discrimination by the government in selecting the petit jury and affirming a judgment of the United States District Court for the Eastern District of New York convicting him of extortion and conspiracy to commit extortion.

OPINION BELOW

On December 7, 1989, the Court of Appeals rendered an opinion, reported at 891 F.2d 439, which is annexed as Appendix A 3-10. On February 20, 1990, the Court of Appeals denied a petition for rehearing with a suggestion for rehearing en banc in an order which is annexed as Appendix A 2.

JURISDICTION

On March 5, 1990, the Court of Appeals granted petitioner's motion for a stay of the mandate for thirty days pending an application to this Court. A copy is annexed as Appendix A 01.

No application has been filed for an extension of time in which to file this petition.

The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation.

STATEMENT OF THE CASE

Petitioner, a black Hispanic who placed minorities in waterfront construction jobs, was retried on charges that he extorted payments from a contractor after a first trial ended with a hung jury. At the first trial, the defense was that all the payments received by petitioner were made to him in the course of his legitimate business as a minority hiring consultant. During jury selection for the second trial, the government used three of its seven available peremptory challenges to exclude blacks and one to exclude an Hispanic. The

government claimed that one black was excluded because he was young and sitting in seat number one sometimes chosen for foreperson, even though the trial judge ultimately instructed the jury to select a foreperson itself. A second black was excluded, according to the government, because she had children petitioner's age, even though it did not challenge other such jurors. The government claimed to have excluded the third black because she was a social worker, even though it did not challenge a paraprofessional guidance counselor. The Hispanic was excluded supposedly because of his difficulties with English, even though the only evidence in the record relied upon by the government in support of this claim is that defense counsel acknowledged that the individual spoke with a thick accent.

The Magistrate before whom jury selection was held without objection accepted the government's explanations about two of the excluded venirepersons--the young man in seat number one and the social worker--but made no other factual findings. Rather, after some colloquy acknowledged by the Court of Appeals below to be confused and as reflecting a misunderstanding by both the Magistrate and the prosecutor of the procedures to be followed in resolving a Batson challenge, the Magistrate ruled that petitioner had not made even a prima facie case of discrimination. On appeal to the Second Circuit, petitioner argued that he had established a prima facie case under Batson because of the number of strikes excluding minorities, the palpable lack of merit of the government's ex-

planations, and the unusual factual context in which the government knew from a prior trial that petitioner's racial and ethnic status was crucial to the defense.

The Court of Appeals, however, refused to decide whether petitioner had established a prima facie case, but ruled that whether the government in fact discriminated against blacks and Hispanics was irrelevant: "[O]ur task in assessing a claim of discriminatory use of peremptory challenges on appeal from a conviction is to determine whether the group alleged to have been impermissible challenged is 'significantly underrepresented' in the jury that convicted the appellant." 891 F.2d at 445. The court concluded that "we do not believe that the incremental benefit of enforcing Batson . . . by vacating convictions obtained with fairly representative juries is warranted." Id. The principal authority relied upon by the court was McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 478 U.S. 1001 (1986), appeal dismissed, No. 84-2026 (2d Cir. Oct. 23, 1986), a decision rendered before both Batson and Holland v. Illinois, 58 U.S.L.W. 4162 (Jan 22, 1990), that applied sixth amendment analysis to the issue of discrimination in the selection of a petit jury. Thus, even if a prima facie case had been established by petitioner and not rebutted by the government, reversal was not requied, according to the court below, because the jury adequately represented the Eastern District of

New York by including one black and two Hispanics.[1]

[1] The panel did rule that the Government's argument that Hispanics are not a protected class for purposes of Batson analysis was without merit. 891 F.2d at 443-44.

REASONS FOR GRANTING THE WRIT

INTENTIONAL DISCRIMINATION BY THE GOVERNMENT IN SELECTING A PETIT JURY IN VIOLATION OF THE FIFTH AMENDMENT IS NOT RENDERED HARMLESS MERELY BECAUSE THE FINAL COMPOSITION OF THE JURY SOMEWHAT REFLECTS THE DISTRICT OF TRIAL

The opinion below holds, inconsistently with every circuit that has considered the issue, that a defendant has no remedy on appeal for intentional discrimination by the government during jury selection in violation of the fifth amendment if the final composition of the jury adequately reflects the demographic makeup of the district. The opinion totally ignores the interests identified by this Court in Batson v. Kentucky, 476 U.S. 79 (1986), in eradicating discrimination from the criminal justice system, interests crucial to the defendant, potential jurors, and the public at large. Reasoning as if the only interest at stake were the defendant's interest in the final racial composition of the jury, the court below based its analysis on a confusion of the interests protected by the equal protection component of the Fifth Amendment, which bars intentional discrimination, with those protected by the Sixth Amendment, which bars interference with the defendant's right to trial by a jury reflecting a fair cross-section of the community. If allowed to stand, the rule announced by the court below will be an open invitation to

racist prosecutorial tactics and to selection of jurors by minimum quotas rather than individual merits.

The opinion below is inconsistent with both this Court's precedents and the opinion of every other circuit that has considered the issue. This Court has made clear that discrimination in grand jury selection is never harmless error no matter how overwhelming the trial evidence, Vasquez v. Hillery, 106 S. Ct. 617, 622-23 (1986), and that excluding a potential juror improperly for his views on capital punishment requires reversal without speculating about how the jury would have been composed otherwise or what the outcome of the trial might have been, Gray v. Mississippi, 107 S. Ct. 2045, 2056-57 (1987). Indeed, this Court vacated two convictions for reconsideration in light of the Batson rule even though blacks had sat on the juries. Grandison v. United States, 107 S. Ct. 1270 (1987) (vacating opinion reported at 780 F.2d 425 (4th Cir. 1985)); Allen v. United States, 107 S. Ct. 1271 (1987) (vacating opinion reported at 787 F.2d 933 (4th Cir. 1985)). Accordingly, the decision below is inconsistent with the clear law of this Court governing impermissible tactics by the government in choosing a jury.

This Court has also made clear that the interests protected by the fair cross-section requirement of the sixth

amendment are distinct from those protected by the principle of equal protection. Holland v. Illinois, 58 U.S.L.W. 4162 (January 22, 199), thus casting into doubt the reliance by the court below on rulings that unsuccessful attempts by the government to deny a defendant his sixth amendment right to a trial before a jury reflecting a fair cross section of the community do not require a new trial.[2] No circuit has held that the number of minorities on the jury defeats a prima facie case under Batson per se, and at least three circuits have held that the final composition of the jury need not defeat a prima facie case. See United States v. Clemmons, 843 F.2d 741, 747 (3d Cir. 1988), cert. denied, 109 S. Ct. 97 (1988); United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987); United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986).[3]

The right to equal protection reaffirmed in Batson extends to the defendant on trial, the potential jurors called

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[2] Holland was decided while the petition for reharing was pending in the court below. Petitioner notified the court of the Holland decision and urged the court to reconsider its ruling (and reliance on prior Second Circuit law inconsistent with Holland) in light of that decision.

[3] By framing the issue as whether appellate relief were available assuming the existence of a prima facie case, the panel appeared to sidestep the question whether the percentage of minority group members sitting on the final jury defeated a prima facie case. It is inconceivable, however, that a factor that defeats relief ultimately would not also defeat a prima facie case. There is no point in finding a prima facie case despite the presence of a particular factor and subsequently denying relief because of that factor alone. Accordingly, the opinion below is inconsistent with the decisions of other circuits cited in the text, supra.

for service, and the public at large: Whenever the government excludes a potential juror only because of the defendant's race, it stigmatizes both the defendant and the veniresperson because of their race; the defendant suffers trial before a jury composed differently than one picked without regard to race; and the public is denied confidence in the fairness of the system of justice. See generally Batson v. Kentucky, 476 U.S. at 85-89; Carter v. Jury Commission, 396 U.S. 320, 329 (1970); Strauder v. West Virginia, 100 U.S. 303, 305 (1880). If the government excluded three blacks and an Hispanic because Horacio Alvarado is black and Hispanic, petitioner's jury was composed differently than it would have been absent impermissible discrimination. No amount of hindsight can determine accurately how the jury would have been composed otherwise or what the outcome of the trial would have been. See Gray v. Mississippi, 107 S. Ct. at 2056-57 (1987); Moore v. Estelle, 670 F.2d 56, 58 (5th Cir. 1982) (Goldberg, J.).[4] And the stigma against Horacio Alvarado and the excluded jurors was not lessened by the presence of another black and two other Hispanics on the jury, no more than a job applicant who is rejected because he is black is made whole by the employer's hiring somebody else who happens to be black. See Connecticut v. Teal, 457 U.S. 440, 450 (1982) (percentage of minorities in employer's workforce irrelevant in assessing discriminatory impact of employment test resulting in exclusion of particular individuals); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n.14 (1977) ("A single invidious discriminatory government act would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions.").

Because the court below failed to acknowledge the scope and extent of the constitutional wrong, it denied relief on the basis of a factor unrelated to the wrong. See generally Hobby v. United States, 468 U.S. 339, 350-63 (Marshall, J., dissenting).[5] The number of minority group members who

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[4] Ross v. Oklahoma, 108 S. Ct. 2273, 2277-78 (1988), in which this Court refused to extend the analysis of Gray v. Mississippi to the erroneous denial under state law of "for cause" challenges to the defense does not suggest that appellant suffered no constitutional harm. In Ross, this Court considered the consequence of a peremptory challenge lost to the defense when it was expended to exclude a juror who should have been excluded for cause. The peremptory lost to the defense was a creature of state, not federal constituional, law. Thus, as the jury did not include anybody who the defense had a right to exclude, the defendant in Ross was not denied any federal constitutional right. The present case, in contrast, involves a direct deprivation of the most fundamental constitutional right of all--equal treatment of all races before the law--by exclusion of jurors who should have been

(fn. cont'd)

permitted to sit.

[5] The Hobby holding that a white male was not entitled to a new trial because of discrimination against blacks and females in selection of the grand jury foreman turned on the limited role of the foreperson and on appellant's non-membership in the class suffering discrimination. See Hobby v. United States, 468 U.S. at 344-50. The relevance of Hobby here is not its holding, but the framework for analysis set out in Justice Marshall's dissent, joined by Justices Brennan and Stevens, focusing on the impact of discrimination generally on the defendant, the excluded jurors, and the public and on the necessity of nullifying the verdict as a remedy.

eventually sit on the jury reflects no more than the extent of the government's discrimination, not whether discrimination occurred. And the justified refusal of courts to apply sixth amendment fair cross-section analysis to the composition of the fianl jury because groups of twelve are too small for statistical analysis also demonstrates the impropriety of denying relief because of the final composition. Whether or not the final jury included any particular number of minority group members may well have been, at best, an accident. But aside from being theoretically unsound, the opinion's focus on the composition of the jury will lead, in practice, to incongruous and unacceptable results.

Most importantly, the opinion below encourages the government to engage in racial discrimination that will appear harmless rather than to refrain from discrimination entirely. Under the new rule, the prosecutor will know that it faces no threat of losing a conviction so long as it does not exclude too many minorities. A prosecutor will be free to accept the first two or three minority group members who are called and to exclude the rest without explanation. By suggesting that Batson violations don't matter until there are too many, the new rule gives the government free rein to discriminate so long as it can find a minimum number of minority jurors who appear suitably pro-prosecution. It is hard to imagine a

rule that could do more to undermine confidence that justice is administered blindly in our courts.

Furthermore, the criterion relied upon by the court below--that the one black and two Hispanics who sat on the jury adequately reflected the district--does not provide a useful rule of decision. Even if it could be said that the one black who sat on the jury adequately reflected petitioner's Brooklyn community, the result in petitioner's case, under the court's analysis, would depend entirely on the racial composition of the district in which petitioner was tried. A defendant tried before an all white jury in the district of Iowa will not be entitled to relief even if the prosecutor excluded every minority venireperson because an all white jury will always reflect the racial composition of the mostly white district. At the other extreme, a defendant tried before a mostly black jury in the District for the District of Columbia might prevail under the new rule even if only one black were excluded because the presence of even a small number of whites on the final jury could prevent the jury from statistically reflecting the mostly black district.[6]

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6 Indeed, the opinion below acknowledges implicitly that the result in this case may have depended on the trial date--before implementation of a new Jury Selection Plan providing that jurors will not be summoned from suburban counties for service in Brooklyn. See 891 F.2d at 444 & n.4. Accordingly, under the court's rule, petitioner would have been granted a new trial had the jury been selected after January 21, 1988, even though the underlying acts of discrimination requiring reversal were the same.

The issues presented by the decision below are of paramount importance. Individual acts of discrimination must be recognized to be prohibited by the principle of equal protection. If allowed to stand, the decision below will render all but the most extreme invidious discrimination in jury selection unreviewable. This Court should grant the petition for a writ of certiorari to make clear that the equal protection component of the due process clause of the fifth amendment requires that petitioner be retried if he established a prima facie case not rebutted by the government that the government discriminated against blacks and Hispanics in selecting a petit jury.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 16 1990

Respectfully submitted,

ABRAHAM L. CLOTT
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Attorney for Petitioner ALVARADO

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ORIGINAL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Second Circuit Rule 27 as governing use of this form is reprinted on reverse of Page 2. Note requirements that supporting affidavits be attached

UNITED STATES OF AMERICA,

Appellee,

- v. -

JAMES SCALA and HORACIO ALVARADO,

Appellants.

Use short title

88-1303(L), 88-1420

Docket Number

NOTICE OF MOTION

For an order granting appellant's motion for a stay for 30 days pending application to the Supreme Court for a writ of certiorari.

MOTION BY: *(Name, address and tel. no. of party and of attorney in charge of case)*

THE LEGAL AID SOCIETY/FOSAU
By: ABRAHAM L. CLOTT
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (212) 285-2842

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

United States Department of Justice
BY: FRANK J. MARINE, ESQ.
Criminal Division
1400 New York Ave., N.W., Room 2738
Washington, DC 20530
Tel. No.: (202) 633-1569

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:
A. by scheduling order? ☐ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed: Bartels, J., United States District Court, EDNY

Brief statement of the relief requested: For an order granting appellant's motion pursuant to Fed. R. App. P. 41(b) for a stay of the mandate for thirty days pending application to the Supreme Court for a writ of certiorari.

Complete Page 2 of This Form

By: *(Signature of attorney)*

Signed name must be printed beneath

ABRAHAM L. CLOTT

Appearing for: *(Name of party)*

HORACIO ALVARADO

Date

February 26, 1990

Appellant or Petitioner: ☐ Plaintiff ☒ Defendant
Appellee or Respondent: ☐ Plaintiff ☐ Defendant

ORDER

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IT IS HEREBY ORDERED that the motion be and it hereby is granted.

G. C. Pratt (G.C.P.)

V. Daniel Manton (V.D.M.)

FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of February, one thousand nine hundred and ninety.

UNITED STATES OF AMERICA,
Appellee,

V

JAMES SCALA and HORACIO ALVARADO,
Defendants,

HORATIO ALVARADO, Defendant-Appellant.

DOCKET NUMBER 88-1303

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellant HORACIO ALVARADO

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

Here was a man who was sorely troubled by the knowledge that his friend was doing something that he believed, and I believe, clearly was wrong. He sought advice from the best sources he knew, his minister and his lawyer. I regret that my colleagues see fit to pat Heller on the back for his contemptible conduct while they castigate Mark Davenport for doing what his conscience and his advisers told him was the proper thing to do.

I regret also that, as a result of our ruling in this case, every disgruntled employee in the Second Circuit henceforth will feel free to report to work with a tape recorder hidden on his person.

UNITED STATES of America, Appellee,

v.

Horacio ALVARADO, Defendant-Appellant.

No. 162, Dockets 88-1303(L), 88-1420.

United States Court of Appeals, Second Circuit.

Argued Oct. 5, 1989.

Decided Dec. 7, 1989.

Defendant was convicted of extortion and conspiracy to commit extortion by the United States District Court for the Eastern District of New York, John R. Bartels, J., and defendant appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that defendant was not entitled to reversal of conviction based upon allegations of *Batson* error.

Affirmed.

1. Jury ⇐33(5.1)

When defense counsel contends that prosecutor is exercising peremptory challenges in violation of equal protection clause, initial issue for judge is whether prima facie case of discrimination has been shown; to make prima facie showing of discriminatory peremptory challenges, defendant must demonstrate that members of his or her cognizable racial group were excluded from jury and that facts are sufficient to support inference of purposeful racial discrimination. U.S.C.A. Const. Amend. 14.

2. Jury ⇐120

Once prima facie case has been established in *Batson* challenge, burden shifts to party opposing claim of discrimination to offer legitimate, nondiscriminatory reasons for challenged acts; if opposing party carries burden of production and raises genuine issue of fact as to whether it acted with discriminatory intent, trier of fact must then decide, with burden of persuasion on claimant, ultimate issue of discrimination.

3. Jury ⇐121

In *Batson* challenge where judge acts as trier of fact, judge must determine whether defendant has proved by preponderance of evidence those underlying facts on which defendant relies to raise presumption that prosecutor used peremptory challenges in discriminatory manner; if claim is based on challenges used against group that is not obviously cognizable class, preliminary fact-finding must also resolve existence of such class; once preliminary fact-finding has been done, judge must then determine, as matter of law, whether underlying facts suffice to establish prima facie case.

4. Jury ⇐33(1.3)

Hispanics constitute cognizable group for purpose of assessing claims of discriminatory use of peremptory challenges; defendant is not required to establish that fact when challenging exclusion of Hispanics from jury.

5. Jury ⇐121

Under *Batson*, judicial officer must determine whether prima facie case is established, and if so, whether prosecutor's subsequent explanations adequately rebut presumption that Government used its challenges in discriminatory way; upon finding of discrimination, judicial officer should promptly take corrective action before jury selection has been completed.

6. Criminal Law ⇐1134(5)

Appellate court's task in assessing claim of discriminatory use of peremptory challenges on appeal from conviction is to determine whether group alleged to have been impermissibly challenged is significantly underrepresented in jury that convicted defendant; in absence of such underrepresentation, Sixth Amendment right to unimpeded possibility that jury will be fair cross section of community has not been violated. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐1166.16

Defendant was not entitled to reversal of conviction based upon alleged *Batson* error; Blacks and Hispanics constituted 25% of jury, approximating their percentage in district of 29%.

8. Criminal Law ⇐986.4(1)

District court was not required to make specific finding as to allegations of factual accuracy in presentence investigation report; information in report was not relied upon in arriving at sentence.

Abraham L. Clott, New York City (The Legal Aid Society, New York City, on the brief), for defendant-appellant.

Frank J. Marine, U.S. Dept. of Justice, Washington, D.C. (Andrew J. Maloney, U.S. Atty., Brooklyn, N.Y.; Alan M. Friedman, U.S. Dept. of Justice, Washington, D.C., on the brief), for appellee.

Before NEWMAN, PRATT, and MAHONEY, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

This appeal concerns primarily the implementation of the holdings in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *McCray v. Abrams*, 750 F.2d 1113 (2d Cir.1984), *vacated and remanded*, 478 U.S. 1001, 106 S.Ct. 3289, 92 L.Ed.2d 705 (1986), *appeal dismissed*, No. 84-2026 (2d Cir. Oct. 23, 1986), proscribing a prosecutor's use of peremptory challenges on the basis of race or other impermissible categories. Horacio Alvarado appeals from the September 29, 1988 judgment of the District Court for the Eastern District of New York (John R. Bartels, Judge) convicting him, after a jury trial, of extortion and conspiracy to commit extortion, in violation of 18 U.S.C. §§ 1951, 1952 (1982 & Supp. V 1987), and sentencing him to a three-year term of imprisonment and a four-year term of probation. Alvarado, who is described by his counsel as half Black and half Puerto Rican, contests a discriminatory the Government's use of its peremptory challenges against Blacks and Hispanics and also seeks resentencing on the ground that the District Court did not make clear whether an unresolved factual dispute influenced its sentence. For reasons set forth below, we affirm.

1. Peremptory challenges

Jury selection was conducted before a magistrate without objection, a practice we have recently approved. *See United States v. Vanwort*, 887 F.2d 375, 382-83 (2d Cir.1989). The jury was chosen using the "jury box" system, with challenges exercised in "rounds." *See United States v. Blouin*, 666 F.2d 796 (2d Cir.1981). In round one, the prosecution used its challenge against a Black, William Clark; in round two, against a White; in round three, against an Hispanic, Mario Garcia; in round four, against a Black, Essie Calder; in round five, the challenge was waived; and in round six, against a White. In the selection of the three alternates, the Government used its one challenge against a Black, Sondra Brown.

At that point, counsel for Alvarado asked the Magistrate to require the prosecution to state its reasons for using four of its challenges against Black and Hispanic members of the venire. The prosecution's initial reply disputed the existence of a *prima facie* case of discriminatory use of peremptory challenges sufficient to require a statement of reasons. The prosecutor pointed out that in selecting the jury of 12

only three of six challenges had been used against minority members of the venire and that at the time a challenge was waived in the fifth round, two Hispanics and one Black were seated in the jury box, available to be challenged. The Magistrate then said he would afford the prosecutor an opportunity to state reasons "[i]f you wish to say anything," whereupon the prosecutor said that he was willing to respond but thought that a "finding" had to be made before the Government was obliged to state reasons. The Magistrate replied that "if you wish ... to explain I think it would be quite helpful of [*sic*] finding in this particular case" but made clear that no reasons were being required: "I'm giving you the opportunity to explain any of your challenges. I'm giving you that opportunity if you choose that's your prerogative."

The prosecutor then volunteered reasons for the four minority challenges: Clark was challenged because his youth and lack of experience made him an inappropriate candidate for foreman, which the prosecutor assumed he would become by virtue of his being juror number one; Garcia was challenged because his lack of fluency in English caused concern that he might have difficulty understanding tape recordings; Callier was challenged because, with children the age of the defendant, she might be unduly sympathetic; Brown was challenged because she was a social worker.[1]

After hearing these explanations, the Magistrate rejected defense counsel's complaint about the prosecutor's use of peremptory challenges, but the ruling left it unclear whether the Magistrate was determining as a matter of law that the defense had failed to establish a *prima facie* case of discriminatory use of challenges or was determining as a matter of fact that a discriminatory use of challenges had not occurred. First, the Magistrate accepted the prosecutor's explanations for the challenges to Clark and Brown. No explicit finding was made concerning the explanations for the challenges to Garcia and Callier. Then, seeming to reject a *prima facie* case as a matter of law, the Magistrate referred to the defendant's "initial burden" to "show a pattern ... of conduct to exclude minority members" and said "there is no pattern." However, seeming to rule on the ultimate issue as a matter of fact, the Magistrate also stated that "the government has explained itself in sufficient detail for me to make the following findings without hesitation" and concluded that "there was not an intent to make or deprivation of a right to a jury trial by peers."

The jury of twelve as empaneled included one Black and two Hispanics.

[1] When a defense counsel contends that a prosecutor is exercising peremptory challenges in violation of the Equal Protection Clause, the initial issue for the judge is whether a *prima facie* case of discrimination has been shown. *Batson v. Kentucky*, 476 U.S. at 93–96, 106 S.Ct. at 1721–23. To make a *prima facie* showing of discriminatory peremptory challenges, a defendant must demonstrate that members of his or her cognizable racial group were excluded from the jury and that the facts are sufficient to support an inference of purposeful racial discrimination.

> [T]he defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida*, [430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977)], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, [345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)]. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

1. The transcript, which is frequently garbled, attributes this explanation to the Magistrate, but the phrasing of the explanation makes it clear that it was the prosecutor who was speaking.

Batson v. Kentucky, 476 U.S. at 96, 106 S.Ct. at 1723.

As the proceedings in the instant case reveal, confusion sometimes arises as to what is meant by "*prima facie* case" in this context and what procedure should be followed in ascertaining whether such a case has been presented. Normally, "*prima facie* case" means a presentation of evidence that suffices as a matter of law to warrant submission of an issue for decision by the trier of fact. 9 J. Wigmore, *Evidence* § 2494 (J. Chadbourn rev. ed. 1981). In the context of determining the existence of discriminatory intent, however, "*prima facie* case" has a different meaning. In this setting, as the Supreme Court explained in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the phrase means presentation of evidence sufficient to establish what the Court called "a legally mandatory, rebuttable presumption," *id.* at 254 n. 7, 101 S.Ct. at 1094 n. 7. The Court used this somewhat cumbersome phrase to convey the idea that where the evidence suffices to establish a "*prima facie* case" of discriminatory intent, the party claiming the existence of such intent is entitled to prevail if (a) the fact-finder believes the claimant's evidence and (b) the party resisting the claim offers no evidence. *Id.* at 254, 101 S.Ct. at 1094. The difference between the traditional and the special meanings of "*prima facie* case" is subtle: With the former, the fact-finder first decides whether to credit the claimant's evidence of the underlying facts and then is entitled to, but need not, draw the inference of the ultimate fact sought to be proved by the claimant; with the latter, the fact-finder determines only whether to credit the claimant's evidence of the underlying facts that give rise to the presumption but performs no fact-finding on the ultimate fact of discriminatory intent, since, where the conditions for the presumption are met, the claimant wins.[2]

[2] Once a *prima facie* case in this special, or "presumption" sense, has been established, the burden shifts to the party opposing the claim of discrimination to offer legitimate, non-discriminatory reasons for the challenged acts. If that opposing party carries this burden of production and raises a genuine issue of fact as to whether it acted with discriminatory intent, the trier of fact must then decide, with the burden of persuasion on the claimant, the ultimate issue of discrimination.

When the Supreme Court described the elements of a "*prima facie* case" in the context of a claim of discriminatory use of peremptory challenges, it was using the phrase in the "presumption" sense. This is apparent from footnote 18 of *Batson*, which explained that the "decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules." 476 U.S. at 94 n. 18, 106 S.Ct. at 1721 n. 18. (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Department of Community Affairs v. Burdine*, *supra*; and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983)).[3]

2. The reason the claimant wins is that the existence of a *prima facie* case in the special or "presumption" sense of the term makes it "more likely than not" that the unexplained circumstances were in fact brought about by intentional discrimination. *See Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978).

3. The operation of burden of proof rules in the context of a claim of discriminatory use of peremptory challenges is put in some doubt by the Court's statement that, after a *prima facie* case is presented, the party opposing the claim must "*demonstrate* that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" *Batson v. Kentucky*, 476 U.S. at 94, 106 S.Ct. at 1721 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972)) (emphasis added). Though the use of the word "demonstrate" might be thought to oblige the party opposing the claim to *persuade* the trier of fact that non-racial considerations were used, the Court dispelled this interpretation by stating elsewhere that the only burden shifted to the prosecutor is "to come forward with," *id.* at 97, 106 S.Ct. at 1723, and "to articulate," *id.* at 98, 106 S.Ct. at 1724, its nonracial explanation. The Court also emphasized that "[t]he party alleging that he has been the victim of intention

[3] Where, as in this case, the judge serves as the trier of fact, the role of the judge as determiner of a *prima facie* case is easily confused with the role of the judge as fact-finder on the ultimate issue—whether the prosecutor used peremptory challenges on a discriminatory basis. Confusion also arises because the threshold decision concerning the existence of a *prima facie* case of discriminatory use of peremptory challenges involves both issues of fact and an issue of law. The judge, as trier of fact, must determine whether the claimant (here, the criminal defendant) has proved by a preponderance of the evidence those underlying facts on which the claimant relies to raise a presumption that the prosecutor used peremptory challenges in a discriminatory manner. These facts concern the racial identities of those challenged and those available for challenge by the prosecutor and the racial composition of the venire and the community. If the claim is based on challenges used against a group that is not obviously a "cognizable class" within the meaning of our decision in *McCray*, this preliminary fact-finding must also resolve the existence of such a class. Once this preliminary fact-finding has been done, the judge must then determine, as a matter of law, whether these underlying facts suffice to establish a *prima facie* case.

In this case, the prosecutor correctly informed the Magistrate of the need to determine whether the defendant had carried his initial burden of presenting a *prima facie* case before the prosecutor could be obliged to state reasons for his challenges. However, the prosecutor was incorrect in inviting the Magistrate at that point to make a "finding," if by that term he meant a finding on the ultimate factual issue of discriminatory intent. Moreover, the Magistrate was incorrect to pretermit the determination of a *prima facie* case and leave it to the prosecutor's "prerogative" to offer explanations. In a proper *Batson* hearing, if the Magistrate was satisfied that the defendant had presented a *prima facie* case, at that point the burden would have shifted to the prosecutor to offer neutral explanations for challenging the jurors. *Batson v. Kentucky*, 476 U.S. at 97, 106 S.Ct. at 1723. Then the Magistrate should have made findings as to the legitimacy of the explanation offered by the prosecutor with respect to each challenged minority member of the venire. In outlining the allocation of burdens in a *Batson* hearing, we do not rule out the possibility that where a judge has ascertained that a *prima facie* case of discrimination has not been shown, a prosecutor, to protect an ensuing conviction in the event the threshold determination is rejected on appeal, may nevertheless elect to state explanations and invite the judge to assess their legitimacy. If the judge, as fact-finder, then concludes that no discrimination occurred, the prosecutor would have two grounds on which to defend the jury selection on appellate review.

On appeal, the parties join issue as if the Magistrate had ruled solely with respect to the existence of a *prima facie* case. The appellant contends that such a case was established, relying on the fact that, of the six challenges exercised by the prosecutor, four were used against minority members of the venire. In response, the Government contends first, that Hispanics are not a cognizable racial group under *Batson*. Next, the Government asserts that a *prima facie* case was not shown. In making this point, the Government, reflecting the confusion that occurred during jury selection, argues both that the pattern of exercising challenges did not create a *prima facie* case of discrimination and that the prosecutor's explanations had dispelled any basis for an ultimate finding of racial bias.

[4] We reject the Government's preliminary assertion that Hispanics are not a cognizable group for the purpose of assessing claims of discriminatory use of peremptory challenges as well as its subsidiary assertion that a defendant must affirmatively establish in each case that Hispanics constitute such a group. These positions

al discrimination carries the ultimate burden of persuasion." *Id.* at 94 n. 18, 106 S.Ct. at 1721 n. 18.

are untenable after our decision in *McCray*. There we affirmed the District Court's ruling that the defendant had proved a *prima facie* case of discriminatory peremptory challenges against Black and Hispanic venire members. 750 F.2d at 1133. Implicit in our holding was the view that Hispanics constitute a cognizable group, a fact that the defendant had not been required to establish when challenging their exclusion from the jury. *See United States v. Chinchilla*, 874 F.2d 695, 698 (9th Cir.1989); *United States v. Gerena*, 677 F.Supp. 1266, 1275 (D.Conn.1987); *United States v. Biaggi*, 853 F.2d [illegible] (Mexican-Americans), *cert. denied*, — U.S. —, 109 S.Ct. 1342, 103 L.Ed.2d 581 (1989); *cf. Castaneda v. Partida*, 430 U.S. 482, 495, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977) (underrepresentation of Mexican-Americans sufficient to establish *prima facie* case of discrimination in grand jury selection). Though issues may arise as to whether a particular individual is properly included within the category of "Hispanics," the classification has sufficient cohesiveness to be "cognizable" for jury discrimination claims. Indeed, it is somewhat surprising that the Executive Branch, which uses the term "Hispanic" and similar categories in implementing anti-discrimination standards, *see* 29 C.F.R. § 1607.4 (EEOC's use of category "Hispanic" in evaluating selection procedures under Title VII); *cf.* 13 C.F.R. § 317.2 (1989) (using term "Spanish-speaking" for minority business enterprises "set-aside" program), should disclaim the pertinence of the category "Hispanic" in the context of jury selection. *See United States v. Yonkers Contracting Co.*, 682 F.Supp. 757, 763 (S.D.N.Y.1988).

Whether Alvarado actually established a *prima facie* case is a closer question. In *Batson*, the Court indicated that evidence of a "pattern" of strikes against members of a cognizable racial group can give rise to an inference of discrimination. 476 U.S. at 97, 106 S.Ct. at 1723. Alvarado contends that such a pattern was established here because, of the six challenges used by the prosecutor, four were used against venire members who were Black or Hispanic. Appellant views this as a rate of minority challenges of 67 percent, which he asserts is considerably higher than the minority percentage of the venire. However, since the prosecutor waived one challenge at a point where minority venire members were available for challenge, it is more pertinent to note that the challenge rate was 57 percent (four of seven of all venire members and 50 percent (three of six) in the selection of the jury of twelve prior to the selection of alternates. The record does not disclose the minority percentage of the venire, but we may take judicial notice that the minority percentage of the Eastern District of New York, from which the venire was drawn,[4] is 29 percent.[5] *Batson's* citation of *Castaneda v. Partida*, 476 U.S. at 96, 106 S.Ct. at 1723, indicates that statistical disparities are a relevant factor in making a *prima facie* case, although a statistical disparity based on numbers as small as those normally involved in peremptory challenges is not as significant as those occurring in employment contexts where normally a larger universe is analyzed.[6]

[5] In this case, we need not determine whether this rate of minority challenges establishes a *prima facie* case of discriminatory peremptory challenges. The issue we face on appeal from a conviction is

4. Under the Jury Selection Plan of the Eastern District, as used at the time Alvarado's jury was selected, jurors summoned for service at Brooklyn were drawn from throughout the District. An amended plan, adopted January 21, 1988, provides that jurors will not be summoned for service at Brooklyn from Suffolk and Nassau Counties, but this amended plan has not yet been put into practice because of judicial vacancies.

5. This percentage is derived from the figures for the total populations and the Black and Hispanic populations of each of the counties of the Eastern District. Bureau of the Census, *Statistical Abstract of the United States* (108th ed. 1988).

6. *See* D. Baldus & J. Cole, *Statistical Proof of Discrimination* § 9.1 (1980 & Supp.1987); Kaye, *Statistical Evidence of Discrimination in Jury Selection*, in *Statistical Methods in Discrimination Litigation* (D. Kaye & M. Aickin eds. 1986).

different from the one faced by a judicial officer in the course of jury selection. Under *Batson*, the judicial officer must determine whether a *prima facie* case is established and, if so, whether the prosecutor's subsequent explanations adequately rebut the presumption that the government used its challenges in a discriminatory way. Upon a finding of discrimination, the judicial officer should promptly take corrective action before jury selection has been completed. *McCray v. Abrams*, 750 F.2d at 1132 ("If the court determines that the prosecution's presentation is inadequate to rebut the defendant's proof, the court should declare a mistrial and a new jury should be selected from a new panel.") As we emphasized in *Roman v. Abrams*, 822 F.2d 214 (2d Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 1311, 103 L.Ed.2d 580 (1989), "[I]t is incumbent upon the trial judge to apply the *McCray* Sixth Amendment principles *during the jury selection process*, and to grant the defendant an appropriate remedy when a *prima facie* case has been made of the prosecutor's racially discriminatory use of peremptory challenges and the state has not successfully rebutted that case by presenting creditable race-neutral reasons for the challenges." *Id.* 109 S.Ct. at 229 (emphasis added).

[6] However, our task in assessing a claim of discriminatory use of peremptory challenges on appeal from a conviction is to determine whether the group alleged to have been impermissibly challenged is "significantly underrepresented" in the jury that convicted the appellant. *Id.* In the absence of such underrepresentation, the Sixth Amendment right to the unimpeded possibility that the jury will be a fair cross-section of the community has not been violated. That was the holding in *Roman v. Abrams*, where we declined to disturb a conviction because no significant underrepresentation occurred. Arguably, this "bottom-line" approach is more appropriate for Sixth Amendment "fair cross-section" claims than for equal protection claims, but we do not believe that the distinction is warranted in the assessment of the use of peremptory challenges. *See United States v. Biaggi*, 673 F.Supp. 96, 107 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (2d Cir.1988); *cf. Connecticut v. Teal*, 457 U.S. 440, 450, 102 S.Ct. 2525, 2532, 73 L.Ed.2d 130 (1982) (rejecting bottom-line analysis under Title VII). We recognized in *McCray* and *Roman* that the prosecutor's unwarranted exclusion of cognizable groups should be remedied on the spot, without waiting to see the ultimate composition of the jury. That assures a defendant that discriminatory use of peremptory challenges will be prohibited even in those cases where a fair cross-section might have resulted without prompt corrective action. In those few instances where corrective action should have been taken but was not, either because the judicial officer improperly failed to identify a *prima facie* case or improperly accepted insubstantial explanations from the prosecutor, we do not believe that the incremental benefit of enforcing *Batson* and *McCray* by vacating convictions obtained with fairly representative juries is warranted.

[7] Here, Blacks and Hispanics constituted 25 percent of the jury, approximating their percentage in the Eastern District of 29. Applying *Roman v. Abrams*, we see no basis for disturbing the conviction. In view of this conclusion, we need not consider the Magistrate's subsidiary findings made with respect to two of the prosecutor's explanations nor the ultimate finding, based on the entire record of the jury selection process, that no discrimination was established.

2. Sentencing.

[8] Alvarado also claims that the District Court relied on disputed facts to enhance his sentence, arguing that the presentence investigation report erroneously suggested that he caused damage to the construction site. The record shows, however, that the controverted matter did not influence the judge's sentence. The District Court disclaimed reliance upon this suggestion in the presentence investigation report, stating at one point, "I don't have to decide [whether the defendant caused the damage]." Since this issue was not taken into consideration, the District Court did not have to make a specific finding as to the allegations of factual inaccuracy in the report. We conclude that the sentence is valid.

The judgment of the District Court is affirmed.

Melvyn KAUFMAN, et al.,
Plaintiffs-Appellants,

v.

The CITY OF NEW YORK, et al.,
Defendants-Appellees.

No. 339, Docket 89-7621.

United States Court of Appeals,
Second Circuit.

Argued Nov. 13, 1989.

Decided Dec. 8, 1989.

Appeal from judgment of the United States District Court for the Southern District of New York, Robert J. Ward, J., granting defendants-appellees' motion to dismiss federal constitutional claims and dismissing pendent state law claims.

Milton S. Gould, New York City (Shea & Gould, Robert J. Ward, Jonathan M. Landsman, of Counsel), for plaintiffs-appellants.

Elizabeth S. Natrella, New York City, Asst. Corp. Counsel of the City of New York (Peter L. Zimroth, Corp. Counsel of the City of New York, Pamela Seider Dolgow, Asst. Corp. Counsel, Julian Bazel, Asst. Corp. Counsel, of counsel), for defendants-appellees.

Before FEINBERG and MESKILL, Circuit Judges, and COFFRIN, District Judge.*

PER CURIAM:

Plaintiffs-appellants, the holders of fee or leasehold interests in three Manhattan office buildings, appeal from a judgment of the United States District Court for the Southern District of New York, Robert J. Ward, J., dismissing their complaint on the motion of defendants-appellees City of New York, the Environmental Control Board of the City of New York, Edward I. Koch, in his capacity as Mayor of the City of New York, and the Commissioners of the Department of Environmental Protection and the Department of Buildings. The district court dismissed plaintiffs' federal constitutional claims on the merits, and their pendent state claims for lack of subject matter jurisdiction.

Appellants challenge the constitutionality of New York City Local Law No. 76 of 1985 and related regulations (Local Law 76).[1] During 1968–1971, the period when the buildings in issue were constructed, appellants, in compliance with the city's prior fireproofing requirements, installed asbestos, which was then one of two city approved fireproofing materials. In 1971, the City banned the use of sprayed asbestos in building construction, and in 1985 Local Law 76 was enacted. That law requires, among other things, that the presence and condition of asbestos be ascertained before any building alteration or demolition is performed; that asbestos be removed or encapsulated if such work will cause asbestos to become airborne; and that all asbestos abatement activities be conducted in accordance with approved safety procedures by people with appropriate training and certification. Local Law 76 does not require that building owners remove asbestos that is undisturbed or that will not be disturbed by alteration or demolition.

Appellants contend that the challenged law effects a regulatory taking of their

* Honorable Albert W. Coffrin, Senior United States District Judge for the District of Vermont, sitting by designation.

1. Local Law 76 was amended in December 1986 by Local Law No. 80 of 1986. The main provisions of Local Law 76 as amended have been codified in the Administrative Code §§ 24-146.1 and 27-198.1.